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No. 92-1047

In The

Supreme Court of the United States

October Term, 1992

BILLY W. LAMON, *et al.*,

Petitioners,

vs.

CITY OF SHAWNEE, KANSAS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This Petition follows the Circuit Court's reversal and remand of a judgment in favor of the Petitioners because of an erroneous jury instruction as to the standards or tests to be used for determining whether or not meal periods are compensable work time within the meaning of the Fair Labor Standards Act. Petitioners are current and former patrol officers whose claim included allegations that the City violated the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq.* (the "FLSA" or the "Act") ~~by n~~ot paying the officers for their 30-minute in shift meal periods. All of the issues were submitted to a jury whose relevant

findings were that (1) the City had established a 28-day work period pursuant to § 207(k) of the Act and that (2) "the Plaintiffs [were] entitled to recover under the Fair Labor Standards Act for their meal periods" resulting in a judgment against the City for actual damages, liquidated damages and attorney fees. The Tenth Circuit considered multiple issues raised by the appeal and cross appeal and reversed and remanded for a new trial based on a determination that the instruction on meal periods as literally extracted from 29 C.F.R. § 785.19(a) "countenanced the misapprehension that the performance of *any* official duty, no matter how insignificant, during meal periods rendered the time compensable." *Lamon v. City of Shawnee*, 972 F.2d 1145 at 1158 (10th Cir. 1992).

Since all of the issues were submitted to a jury, the only factual findings relevant to the meal periods were that the Petitioners' employment was covered by § 207(k) of the Act and that the failure to pay for the meal periods was a violation of the Act. Since the Court of Appeals declined to direct a verdict and instead remanded the matter for a new trial on the latter issue, we are left with the only established fact being that the Petitioners were law enforcement employees who worked a 28-day work period established pursuant to § 207(k) of the Act.

There was conflicting evidence during the course of the five day trial as to what, if any, "duties" or "responsibilities" the employees retained during their meal periods other than, as one Petitioner testified, "That essentially the requirement is that the City know where they are during their meal period and that they be able to return to work at the end of that one-half hour."

The Court of Appeals' decision included as "Background" facts which it apparently considered important. This included the City's adoption of Administrative Code No. 2-5, effective March 30, 1986, specifically pursuant to § 207(k) of the FLSA, in

anticipation of the FLSA becoming applicable to state and local government employers on April 15, 1986, as mandated by Congress in the 1985 amendments to the FLSA. The Administrative Code provided for a 28-day work period with overtime pay for hours worked in excess of 171 hours within the 28-day work period. The City continued, however, its "practice of paying overtime for all work, excluding uninterrupted meal periods, in excess of 40 hours per week, or 160 hours per 28 days. The City has compensated, at an overtime wage of time and 1/2, any officer called to duty during a meal period."

The Court of Appeals described the meal periods thus:

> An officer's 1/2-hour meal period begins once the officer arrives at a luncheon location and reports "10-10" to the dispatcher, signifying the suspension of patrol duty. During meal periods, officers are relieved of their patrol assignments, but are subject to call and are required to leave a telephone number where they can be reached or to monitor a portable radio. While on meal break, an officer must respond to emergency calls or personnel shortages if instructed to do so. An officer is relieved of patrol duties during meal time but retains some responsibilities, including: responding to citizen requests or inquiries, responding to crimes committed in the officer's presence and acting in a responsible and professional manner. Officers may take their meal periods at any location within the City or, with approval, outside the City at their homes or at restaurants if in close proximity to the City. The officers may not conduct personal business errands during the 1/2-hour period,

> such as picking up laundry at the cleaners, getting a haircut or grocery shopping.

Lamon, 972 F.2d at 1148, 1149. There was, however, substantial evidence that officers could and did conduct personal business during their 1/2 hour meal periods and that even during their normal working hours it was not uncommon for officers to go to the bank; stop by a cleaners, restaurant or convenience store; make phone calls on personal business or outside business interests; or stop by their homes or apartments for various reasons. It is significant and undisputed that there was no instance where an officer was actually called away from a meal period as a result of an emergency or otherwise, although it was not uncommon for an officer to work through or miss a meal period (always having received overtime pay for doing so).

The Petitioners' "Statement of the Case" is a highly slanted version of facts containing random, out of context bits of testimony from a five day trial. By way of illustration, Petitioners state Petitioners "must remain in uniform in public view." In fact, patrol officers were neither required to remain in public view or in uniform but were prohibited from wearing only a part of the uniform in public. Most meal periods were not spent in public view as evidenced by the testimony of Petitioner Billy Lamon regarding his twenty years of service, "I can't say that I took every E-call over all those years at home, but I could have."

The Petitioners' "Statement of the Case" is equally inaccurate (or at the very least selective and argumentative), in its portrayal of the decision of the Court of Appeals as will be demonstrated in the argument portion of this response.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

This Petition results from that portion of the Court of Appeals' opinion setting out standards to be utilized in determining the compensability of meal periods under the FLSA. This issue as to the proper standards was raised, briefed, argued and decided by the court below in accord with settled principles of law. The questions presented by Petitioners do not address this substantive issue but rather misread or misrepresent the appeals court's opinion in an attempt to show conflict where none exists.

1. The Tenth Circuit did not establish standards for determining the compensability of meal periods of law enforcement employees working hours of duty pursuant to § 207(k) of the Act that were different than the standards applicable to all employees under traditional interpretations of the FLSA.

The first Question Presented by Petitioners, whether or not two Department of Labor regulations have different meanings, is based on Petitioners' assertion that the Court of Appeals determined that 29 C.F.R. § 553.223(b), pertaining specifically to meal periods of law enforcement employees in the § 207(k) context, and 29 C.F.R. § 785.19, pertaining to meal periods generally, should be interpreted so as to result in different standards for determining compensability of meal periods. That assertion is based on a misreading of the Court of Appeals' decision; is contrary to the express language of the decision; is contrary to the conclusions of those district courts which have cited and followed the *Lamon* decision; and is contrary to the conclusion of the Tenth Circuit expressed in its recent opinion citing the *Lamon* decision.

2. The standard for determining the compensability of meal periods set forth by the Tenth Circuit in *Lamon* is not in conflict with the decision of other courts but to the contrary is derived from traditional and settled interpretations of the FLSA.

The second Question Presented by Petitioners, whether 29 C.F.R. § 553.223(b) pertaining to meal periods of law enforcement employees working in the § 207(k) context means that a police officer must "primarily be engaged in work related duties during their meal period" to be entitled to compensation is based on Petitioners taking the quoted phrase from the *Lamon* decision out of context thereby misrepresenting the actual decision. Further, Petitioners' assertion that the regulation should be interpreted to mean that the retention "of any duties, whether active or inactive, whether significant or not" makes the meal periods compensable is contrary to the settled law. To the contrary, the multi-faceted test utilized by the Tenth Circuit in *Lamon* which sometimes is characterized as a "predominantly for the benefit of" or "substantial duties" test is in accord with the settled and established law as set forth in the opinions of the Supreme Court, other United States courts of appeals and United States district courts, particularly those courts that have specifically considered the compensability of the meal periods of local law enforcement officers since the FLSA became applicable to local governments.

I.

THE TENTH CIRCUIT DID NOT ESTABLISH STANDARDS FOR DETERMINING THE COMPENSABILITY OF MEAL PERIODS OF LAW ENFORCEMENT EMPLOYEES WORKING HOURS OF DUTY PURSUANT TO § 207(k) OF THE ACT THAT WERE DIFFERENT THAN THE STANDARDS APPLICABLE TO ALL EMPLOYEES UNDER TRADITIONAL INTERPRETATIONS OF THE FLSA.

As discussed in detail in the following section, the test for determining the compensability of meal periods set forth and utilized by the Tenth Circuit in deciding *Lamon v. Shawnee*, which involved law enforcement employees who were working tours of duty established pursuant to 29 U.S.C. § 207(k), utilized traditional standards derived from settled interpretations of the FLSA. The Tenth Circuit did not create a new or different test and has not, as Petitioners allege, "... created a confusing and insupportable precedent."

In determining the appropriate standards, the Tenth Circuit looked at the regulations set out in 29 C.F.R. § 785.19 which pertains to all employees generally and also 29 C.F.R. § 553.223(b) which pertains specifically to the meal times of law enforcement personnel who are covered by the § 207(k) subsection and correctly noted that § 553.223(b) "applies more precisely to the facts of the case." *Lamon*, 972 F.2d at 1156. While emphasizing, perhaps unduly, the § 207(k) context and the regulation specifically applicable thereto, the court nevertheless makes it clear that there is but one test of compensability stating:

> ... [c]onsistent with the language of Section 553.223(b) *and* with traditional principles underlying FLSA, a law enforcement

> employee is completely relieved from duty during the meal period for purposes of Section 553.223(b) *when the employee's time is not spent predominantly for the benefit of the employer.*

Lamon, 972 F.2d at 1157 (emphasis added).

Further, the court went to some lengths to explain that it was not making a distinction between the two sections, stating in a footnote that:

> Moreover, our contrasting of the two sections, Section 553.223(b) and Section 785.19 does not mean that the "completely relieved from duty" standard as used in the latter section should necessarily take on a different meaning than that of the former section. See e.g., Hill v. United States, 751 F.2d 810, 813-14 (6th Cir. 1894) (applying predominant benefit test to meal periods of letter carrier under Section 785.19).

Lamon, 972 F.2d at 1158, n. 18. By restricting its opinion to the facts of the instant case, the court was merely avoiding any necessity of either disapproving or distinguishing the prior decisions of the United States District Court for the District of Kansas in *Wahl v. Wichita*, 725 F. Supp. 1133 (D. Kan. 1989) and *Nixon v. Junction City*, 707 F. Supp. 473 (D. Kan. 1988). The Tenth Circuit's failure to specifically disapprove, at least in part, the test for compensability of meal periods discussed in *Wahl* and *Nixon* may have left the door open for a misreading of its decision as Petitioners have done. That door has been closed, however, by later decisions of the Tenth Circuit and the United States district courts which have followed *Lamon*.

The specific question of whether *Lamon* should be read to suggest different standards of compensability was considered by the District Court in *Brinkman v. Dept. of Corrections*, 804 F. Supp. 163 (D. Kan. 1992). In *Brinkman*, the court noted that the *Lamon* decision placed in doubt much of the case law of the United States District Court for the District of Kansas pertaining to compensability of meal periods and after reciting in its entirety the standard for determining compensability set out in *Lamon*, the court posed the question as to whether it should ignore *Lamon* as limited to § 553.223(b) and therefore not applicable to non-tour of duty employees. The court concluded there was but one standard and that "for several reasons this court, in good conscience, cannot ignore *Lamon's* precedential weight"; that "This Court believes *Lamon* strongly implies that the 'completely relieved from duty' standard appearing in both Section 553.223(b) and Section 785.19 has the same meaning", and further:

> What the 10th Circuit did in *Lamon* was to remind us that the regulatory standard "completely relieved from duty" cannot be applied singularly or be divorced from the traditional principles underlying the FLSA. Who predominantly benefits from how an employee spends his time is the overriding question of whether the employee is working. Simply because the employee may be on call and retains some other duties during his lunch period does not by perforce require compensation.

Brinkman, 804 F. Supp. at 171, 172.

Similarly the United States District Court for the Eastern District of Arkansas, Western Division in *Houser v. City of N. Little Rock Police Dept.*, No. LR-C-92-111 (D. Ark. Dec. 8, 1992), (*see*

Respondent's Appendix B) concluded that the appropriate standard for determining compensability of the meal periods of the North Little Rock police officers, who were not covered by § 207(k), was that standard set out in *Lamon*, citing the Tenth Circuit's statement that the standard was consistent with both § 553.223(b) (which applied only to § 207(k) employees) and traditional principles underlying FLSA.

Any lingering doubt as to whether the Tenth Circuit in *Lamon* was setting forth a different standard to apply only to § 207(k) employees has been eliminated by its decision in *Lyle G. Armitage v. City of Emporia*, No. 92-3032 (10th Cir. Dec. 18, 1992) *see* Respondent's Appendix A, wherein the court stated:

> Relying on two prior district court decisions, the district court held that the detectives should be compensated for their lunch period because they "were not completely relieved of duty." *Wahl v. City of Wichita, Kan.*, 725 F.Supp. 1133 (D. Kan. 1989); *Nixon v. City of Junction* [sic] *Kansas*, 707 F.Supp. 473 (D. Kan. 1988). However, we recently decided *Lamon v. City of Shawnee*, 972 F.2d 1145 (10th Cir. 1992) which sets forth the correct standard and requires a different outcome under these facts.

Armitage, No. 92-3032 at 3a.

Petitioners' assertion, which is the basis of their first Question Presented, is not supported by the decision itself, by the decision of the United States district courts in *Brinkman* and *Houser* or the decision of the Tenth Circuit in *Armitage*. Moreover, as will be more fully discussed below, Petitioners' assertion is rebutted by the fact that the *Lamon* decision sets out a single standard for determining compensability which is settled law interpreting the FLSA.

II.

THE STANDARD FOR DETERMINING THE COMPENSABILITY OF MEAL PERIODS SET FORTH BY THE TENTH CIRCUIT IN *LAMON* IS NOT IN CONFLICT WITH THE DECISION OF OTHER COURTS BUT TO THE CONTRARY IS DERIVED FROM TRADITIONAL AND SETTLED INTERPRETATIONS OF THE FLSA.

The Tenth Circuit set out the standards for determining the compensability of meal periods in ruling on the City's claim that the trial court erred in instructing the jury and, to a lesser extent, in ruling on the City's claim that the trial court erred in not directing a verdict for the City. In regard to the latter claim, the relevant statement of the court was:

> As discussed in detail below, in the Section 207(k) context, a law enforcement employee is considered to be "completely relieved from duty" during a meal period when the employee's time is not spent *predominantly for the benefit of* the employer. FLSA requires renumeration for meal periods during which a police officer is unable comfortably and adequately to pass the meal time because the officer's time or attention is devoted primarily to official responsibilities.

Lamon, 972 F.2d at 1155 (emphasis added).

In determining that the trial court erred in instructing the jury, the court more fully set out the relevant standard as follows:

> Hence, a police officer must primarily be engaged in work-related duties during meal

> periods to warrant compensation therefore. That a police officer is on call and has some limited responsibilities during meal periods does not by perforce mean the officer is working [citations omitted]. Instead, consistent with the language of Section 553.223(b) and with traditional principles underlying FLSA, a law enforcement employee is completely relieved from duty during a meal period for purposes of Section 553.223(b) when the employee's time is not spent predominantly for the benefit of the employer [citations omitted]. If during meal periods a police officer's time and attention are primarily occupied by a private pursuit, presumably the procurement and consumption of food, then the officer is completely relieved from duty and is not entitled to compensation under FLSA. Conversely, a police officer is entitled to compensation for meal periods if the officer's time or attention is taken up principally by official responsibilities that prevent the officer from comfortably and adequately passing the meal time.

Lamon, 972 F.2d at 1157.

In focusing on the phrase "primarily be engaged in work related duties" the Petitioners take a single phrase out of context and mischaracterize the standard articulated by the Tenth Circuit. This standard or test is multi-faceted and includes consideration of (a) whether or not the time is spent predominantly for the benefit of the employer; (b) whether the employee is unable to comfortably and adequately pass the meal time because his attention is devoted to official responsibilities; and (c) whether the employee retains

substantial or significant duties or responsibilities for the benefit of the employee which prevent the officer from comfortably and adequately passing the meal time. Being on call or having limited responsibilities does not perforce mean that the time is spent predominantly for the benefit of the employer or that it is compensable. These standards have sometimes been characterized as a "predominantly for the benefit of" or "substantial duties" tests.

The two Questions Presented by Petitioners are apparently based on Petitioners' belief that regulations promulgated by the Administrator of the Wage and Hour Division of the Department of Labor are controlling and that the courts must apply a literal interpretation thereof. The real issue is not what is the literal interpretation of the regulation but rather what is "work" within the meaning of the Fair Labor Standards Act and, more specifically in this case, what is the appropriate standard or test to be used in determining whether or not a police officer is working during his meal periods.

This Court, in its first decision defining what was work within the meaning of the FLSA characterized work to mean "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and *primarily for the benefit of* the employer and his business." *Tennessee C., I. and R. Co. v. Muscoda*, 321 U.S. 590 at 598, 64 S. Ct. 698, 703, 88 L. Ed. 949 (1944) (emphasis added). The *Lamon* court's citation of and reliance on *Tennessee* and succeeding cases emphasizing the "predominantly for the benefit of " factor are found in the footnote at page 1157 of the decision. *Lamon*, 972 F.2d at 1157.

The United States District Court for the District of Kansas in *Brinkman*, citing *Lamon* and these traditional principles underlying the FLSA, framed the issue as:

> Who predominantly benefits from how an

> employee spends his time is the overriding question of whether the employee is working. Simply because the employee may be on call and retain some of the duties over his lunch period does not, by perforce, require compensation.

Brinkman, 804 F. Supp. at 172.

The United States District Court of Arkansas, in its decision in *Houser v. City of N. Little Rock Police Dept.*, again placed reliance on the *Lamon* standards with its emphasis on the "predominantly for the benefit of the employer" test, stating:

> Thus, since 1944, in most contexts where the definition of "work" under the FLSA has arisen, courts have applied some version of a "predominantly for the benefit of the employer or employee" test to determine whether the time in question constituted work.

Houser, No. LR-C-92-111 at 16a. If there is any confusion in the *Lamon* decision, it arises from what the *Houser* court characterizes as giving lip service to the phrase "completely relieved from duty" while applying a "predominantly for the benefit of the employer" test.

The Tenth Circuit, in its December 28, 1992 decision in *Armitage v. Emporia* dealing with the meal periods of police detectives, eliminated any reference to the "completely relieved" regulation simply noting that in *Lamon:*

> We held that the proper standard for determining compensability of a meal period is whether the officer is "primarily . . . engaged in

> work related duties during meal periods". [Citation omitted] That a police officer is on call and has some limited responsibilities during meal periods does not perforce mean the officer is working.

Armitage at, 92-3032 at 4a.

Petitioners argue that the Eleventh Circuit in *Kohlheim, et al. v. Georgia*, 915 F.2d 1473 (11th Cir. 1990) utilized a test requiring "that the employee be relieved from all duties, whether active or inactive, to avoid compensation" with emphasis on the word "all." This mischaracterizes the Eleventh Circuit decision which, after citing a part of the regulation at 29 C.F.R. § 785.19, continued:

> Thus, the essential consideration in determining whether a meal period is a bona fide meal period or a compensable rest period, is whether the employees are, in fact, relieved from duty for the purpose of eating a regularly scheduled meal. The district court ruled that the fire fighters were not completely relieved of their duties during meal times and we find no error in this conclusion. [Petitioners end the quote at this point.] During meal times the fire fighters were required to remain at the station and were subject to emergency calls. The record makes clear that the fire fighters were subject to *significant affirmative responsibility* during these periods. The meal time restrictions benefit the county by insuring maintenance of an available pool of competent fire fighters for immediate response to emergency situations. The fire fighters are subject to real limitations on their freedom

> during the meal time which inure to the benefit of the county; accordingly, the three meal time periods are compensable under FLSA regulations for overtime purposes.

Kohleim, 915 F.2d at 1477 (emphasis added). The *Kohlheim* court, consistent with settled law, placed the emphasis on who predominantly benefits from the meal periods and whether or not the employees have significant or substantial duties. The *Kohlheim* decision demonstrates that in determining compensability, consideration must be given to whether passive or inactive duties and responsibilities which continue during the meal period, are, as in the case of fire fighters, the primary duty for which the employee is engaged. A fire fighter's primary duty which may be to do nothing but be available at the station to be called is significantly different than the primary duties of a typical law enforcement officer.

Petitioners also argue that the Tenth Circuit's opinion is in conflict with the opinion of other circuits, which Petitioners argue have literally interpreted the regulation § 785.19 to require compensation for meal periods "if the employee performs *any* work related duties during their meal periods." All of the cases cited by Petitioners, however, actually found substantial duties and none relied on a literal interpretation of the "completely relieved from any duties" regulation:

> (a) the 4th Circuit in *Donovan v. Bel-Lock Diner, Inc.*, 780 F.2d 1113, 1118 (4th Cir. 1985), disallowed the deduction of meal breaks where "the waitress's breaks continued to be interrupted by the demands of customers" with a mere citation to the regulation in a footnote;

(b) the 5th Circuit in *Donovan v. Grantham*, 690 F.2d 453, 477 (5th Cir. 1982), did not even cite or refer to the regulation in holding that the employer could not deduct time for meal periods where the service stations attendants "grabbed a bite to eat during slow periods and left their meals when a customer came into the station" or "ran across the street for a sandwich and always attended to their customers during their meals";

(c) the 8th Circuit in *Mumbower v. Callicott*, 526 F.2d 1183, 1187 (8th Cir. 1975) awarded compensation to the sole operator of a switchboard "for her lunch hour spent at the switchboard" performing duties that were an "integral and indispensable part of the employee's principle work activity"; and

(d) the 9th Circuit in *Brennan v. Elmer's Disposal Service*, 510 F.2d 84, 88 (9th Cir. 1975) stated that the appeal involved a challenge to "the finding that most employees did not stop for lunch and were encouraged not to stop by the Wage Plan."

The decision of the Tenth Circuit in *Lamon* is consistent with traditional interpretations of the FLSA generally and of even greater significance is consistent with those decisions which specifically considered the compensability of meal periods of law enforcement officers. Compensation for meal periods was denied the special police force of the Library of Congress who were required to remain on the premises, in uniform, in possession of their firearms, to monitor two-way radios, to respond to calls from superiors and considered to be "officially on duty and subject to

call" in *Agner v. United States*, 8 Cl. Ct. 635, 27 W.H. Cases 515, *aff'd*, 795 F.2d 1017 (Fed. Cir. 1986). The court stated:

> If covered employees perform substantial duties during their lunch break they must be paid . . . if they are relieved of substantial duties they are following their own pursuits, not the employer's, and this time, if compensated, may offset the other periods.

Agner, 27 W.H. at 516.

> The mere fact that an employee is required to eat lunch on the employer's premises and to be on a duty status subject to emergency calls during such period does not convert this private leisure time into compensable time. *Baylor*, 198 Ct. Cl. at 364.

Agner, 27 W.H. at 517.

More recently (since the FLSA became applicable in 1986) courts have considered the meal periods of local law enforcement officers not compensable for the reason that no "substantial duties were performed and that merely being on call does not make the meal periods compensable." *Atchley v. McLochlin*, 29 W.H. Cases (BNA) 1238 (N.D. Ind. 1986); *Lee v. Coahoma County, Mississippi*, 937 F.2d 220 (5th Cir. 1991); *Leahy v. City of Chicago*, 785 F. Supp. 724 (N.D. Ill. 1992)[1]; *Houser v. N. Little Rock*, No. LR-C-92-111 (D. Ark. Dec. 8, 1992).

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1. Petitioners cite both *Lee* and *Leahy* and seem to suggest they support the Petitioners' position when, in fact, they are directly contrary to Petitioners' position.

Given the settled law pertaining to the compensability of meal periods of law enforcement officers, it is difficult to perceive a reason why this Petition is even being presented to the Court. The Respondent suggests that this Petition is the result of the *district court* decisions in the United States District Courts for the District of Kansas in *Nixon, Wahl, Lamon* and *Armitage* where judgments were entered for local law enforcement officers with references to the "completely relieved" regulations. Those decisions have now been expressly disapproved or reversed by the Tenth Circuit decision herein and in *Armitage v. Emporia.* The now disapproved district court decisions in *Nixon* and *Wahl* with their reference to the "completely relieved of duty, either active or inactive" standard had been cited and followed by the United States District Court for the Eastern District of Arkansas, Western Division in ordering summary judgment in cases captioned *May v. Arkansas Forestry Commission* and *Pebler v. City of Sherwood.* However, that same District Court in *Houser* announced that "after reviewing the recent decisions in other circuits, this court is forced to conclude that its analysis in *May* and *Pebler* would probably not be accepted by the 8th Circuit." In *Houser* the court not only entered summary judgment in favor of the city but concluded that the culprit was the "completely relieved" regulations on which Petitioners place great emphasis, with regard to which the court stated:

> The regulations are inconsistent with federal case law interpretations of the relevant statute and with the underlying principles of the Fair Labor Standards Act which the regulations are to construe. As such, the court has concluded that it may not apply the plain language of the regulations, but must apply the standard for "work" which has been used since the FLSA took effect.

Houser, No. LR-C-92-111 at 12a. And further:

> This court finds the regulations inconsistent with the statutory scheme they were designed to implement, and thus invalid.

Houser, No. LR-C-92-111 at 17a.

With the Tenth Circuit having now disapproved the erroneous standard for determining compensability of meal periods of police officers previously used by the United States District Court for the District of Kansas and with the United States District Court for the Eastern District of Arkansas, Western Division, having disapproved its prior decisions on compensability of meal periods, the law is now well settled in accord with the decision of the Tenth Circuit Court of Appeals in *Lamon v. Shawnee*.

CONCLUSION

The standards for determining compensability under the FLSA of employee meal periods set out in the decision of the United States Court of Appeals for the Tenth Circuit in *Lamon v. Shawnee* are the same standards applicable to all employees under traditional interpretations of the FLSA. The decision of the Tenth Circuit in that regard is not in conflict with the decision of any United States Court of Appeals or of the Supreme Court and the decision is, in fact, based on principles of law long settled by the Supreme Court. The Petition fo Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

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Dated: February 10, 1993

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN *LYLE G. ARMITAGE, JR., ET AL. V. CITY OF EMPORIA, KANSAS*

[stamp]
FILED
United States Court of Appeals
Tenth Circuit
DEC 28 1992
ROBERT L. HOECKER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 92-3032

LYLE G. ARMITAGE, Jr., et al.,

Plaintiffs-Appellees,

vs.

CITY OF EMPORIA, KANSAS,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS (D.C. No. 90-1222-K)

Stanley E. Craven, Spencer Fane Britt & Browne, Kansas City, Missouri (Dale W. Bell, Helbert, Bell & Smith, Emporia, Kansas, with him on the brief) for Defendant-Appellant.

Appendix A

W. Irving Shaw, Emporia, Kansas, for Plaintiff-Appellee.

Before BALDOCK and KELLY, Circuit Judges and BRATTON, District Judge.[1]

KELLY, Circuit Judge.

Defendant-appellant City of Emporia, Kansas appeals the district court's award of backpay to city police detectives for lunch periods and time spent on call. On appeal, defendant argues that the district court erred by: (1) determining that lunch periods constitute compensable working time; (2) determining that time spent "on call" constitutes compensable working time; and (3) improperly calculating the amount of backpay owed to plaintiffs. Our jurisdiction arises under 28 U.S.C. § 1291. We reverse on the first two issues, and therefore need not address the third.

Background

In 1987 the city implemented a flextime policy which allowed detectives to schedule their own eight hour work shift. Detectives were required to take a lunch break of at least one-half hour, for which they were not paid. The break could not be the first or last hour of the shift. Detectives were allowed to eat where they chose, including at home. They were paid for the time going to and coming from lunch, and were required to notify dispatch of their location in case they were needed. They were not allowed to consume alcohol during lunch. They were required to respond to questions from the public if approached during lunch. When

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1 The Honorable Howard C. Bratton, Senior United States District Judge for the District of New Mexico, sitting by designation.

detectives were called back to duty during lunch, they were paid at the overtime rate.

The detectives also rotated standby duty and each detective was on call one week out of six. The standby detective was paid $30 per week, plus overtime for the time actually worked. The standby detective was provided with a pager so he did not have to remain near a phone, although he was required to stay in the vicinity in order to call in within ten minutes of being paged, and report to the station within twenty minutes if necessary. The detectives were called back, on average, less than two times per week of on call duty.

The detectives brought suit for backpay under the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201. Following a bench trial, the district court awarded backpay for plaintiffs' lunch periods and time spent on call.

Discussion

We review the district court's findings of fact under the clearly erroneous standard; conclusions of law we review *de novo*. *See Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 572 (10th Cir.), *cert. denied*, 112 S. Ct. 589 (1991).

I. The Lunch Period Issue

Relying on two prior district court decisions, the district court held that the detectives should be compensated for their lunch periods because they "were not completely relieved of duty." *Wahl v. City of Wichita, Kansas*, 725 F. Supp. 1133 (D. Kan. 1989); *Nixon v. City of Junction, Kansas*, 707 F. Supp. 473 (D. Kan. 1988). However, we recently decided *Lamon v. City of Shawnee*, 972 F.2d

1145 (10th Cir. 1992) which sets forth the correct standard and requires a different outcome under these facts.

In *Lamon*, the city police officers were also on a flextime schedule and were required to check out when taking their lunch break and provide a location and phone number where they could be reached. An officer's half hour lunch began when the officer arrived at a lunch location and checked out with the dispatcher. The officers could not conduct personal errands during lunch, and were required to respond to citizen inquiries and act in a professional manner. We held that the proper standard for determining compensability of a meal period is whether the officer is "primarily . . . engaged in work-related duties during meal periods." *Id.* at 1157. "That a police officer is on-call and has some limited responsibilities during meal periods does not perforce mean the officer is working." *Id.* (citing *Lee v. Coahoma County, Mississippi*, 937 F.2d 220, 225 (5th Cir. 1991)). In the instant case the district court erred by applying the wrong standard for compensability of meal periods. The facts as found by the district court indicate that the detectives were not primarily engaged in work-related duties during meal periods. We reverse the award of backpay for meal periods.

II. The "On Call" Issue

In determining whether time spent on-call should be compensable under the FLSA we look to the facts and circumstances of each case. *Norton v. Worthen Van Service, Inc.*, 839 F.2d 653, 654 (10th Cir. 1988). The district court relied on *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991) *cert. dismissed*, 112 S. Ct. 1310 (1992) in awarding compensation to detectives for standby status. *Renfro* involved firefighters who, while on call, were required to be at the station within twenty

minutes, fully dressed in protective gear. They received on average three to five calls per day. We held that the district court did not err in granting the firefighters' motion for summary judgment, because the firefighters could not use on call time for personal pursuits or other employment due to the quick response time and frequency of calls per day. The instant case is distinguishable from *Renfro* because of differences in the nature of the duties and frequency of the calls.

On call time is compensable if the on call requirements are so restrictive that they interfere with employees' personal pursuits. *Renfro*, 948 F.2d at 1537 (citing 29 C.F.R. § 553.221(d)). However, an employee who is "merely required to leave word at his home or with company officials where he may be reached is not working while on call." *Norton*, 839 F.2d at 655 n. 3 (quoting 29 C.F.R. § 785.17 (1985)). In both *Norton* and *Boehm v. Kansas City Power and Light Co.*, 868 F.2d 1182 (10th Cir. 1989), we held that the FLSA did not require compensation for on-call time where the employees were allowed to leave the employer's premises and were able to pursue personal activities, even though the activities were somewhat restricted because they had to be accessible by pager.

On similar facts, the Eleventh Circuit recently held that detectives' on call time was not compensable. *Birdwell v. City of Gadsden, Alabama*, 970 F.2d 802 (11th Cir. 1992). The *Birdwell* court distinguished *Renfro*, reasoning that firefighters, as opposed to detectives, spent their on call time predominantly for the benefit of the employer because the firefighters could expect several emergency calls per day. *Id.* at 809-10.

In the instant case, the detectives were allowed to do as they pleased while on call, as long as they remained sober, could be

reached by beeper and were able to report to duty within twenty minutes of responding to the page. They were called in on average less than two times per week, as opposed to the twenty to thirty times per week for the firefighters in *Renfro*. The firefighters were required to report within twenty minutes of a call, in full gear, and subject to discipline if late. *Renfro*, 948 F.2d at 1537. Furthermore, the detectives were called in to investigate crimes which had been committed, as opposed to responding to emergencies in progress. The firefighters were "lying in wait for emergencies [which was] a benefit to the employer and thus compensable under FLSA." *Id.* at 1538 (distinguishing *Norton* and *Boehm*, where the employees were not waiting to respond to emergencies). Although the detectives' services are certainly beneficial to the public, to require compensation under these facts would require that all on call employees be paid for standby time. This would be a major change in the law of the FLSA. *See Martin v. Ohio Turnpike Authority*, 968 F.2d 606 (6th Cir. 1992) (no compensation for standby time of highway department employees) *pet. for cert. filed*, 61 U.S.L.W. 3403 (1992); *Owens v. Local No. 169, Ass'n of Pulp and Paper Workers*, 971 F.2d 347 (9th Cir. 1992) (no compensation for standby time of mechanics); *Bright v. Houston N.W. Med. Ctr. Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991) (no compensation for standby time of medical technician) *cert. denied*, 1125 S. Ct. 882 (1992). As such, we also reverse the award of back pay for time spent on call.

The judgment of the district court is REVERSED and the case is REMANDED with instructions to enter judgment for the city.

APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION, IN *JOHN HOUSER, ET AL. V. CITY OF NORTH LITTLE ROCK POLICE DEPARTMENT*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-92-11

JOHN R. HOUSER, ET AL.

PLAINTIFFS

V.

CITY OF NORTH LITTLE ROCK POLICE DEPARTMENT

DEFENDANT

ORDER AND JUDGMENT

This case concerns the alleged failure of defendant to fully compensate plaintiffs for hours worked. Both sides agree that plaintiffs work five 8.25 hour shifts per week.[1] The issue is whether plaintiffs should be compensated for the .5 hour lunch breaks allowed during each shift, and plaintiffs moved for a summary judgment on this issue. After reviewing the matter in

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1. Originally, plaintiffs alleged that the shifts were 8 hours in length, with an uncompensated 15 minute roll call/pre-shift meeting before each shift. Defendant stated that each full shift lasts for 8.25 hours, and stated that the roll call period is part of an 8.25 hour shift. The claims concerning the roll-call meeting are therefore no longer at issue, and plaintiff indicated during a telephone conference that plaintiff no longer intended to pursue the matter of the "pre-shift" meetings.

conjunction with recent case law, the Court determined that summary judgment was perhaps appropriate, but in favor of defendant.[2] Although defendant did not specifically move for summary judgment on this issue, in defendant's response to plaintiff's motion, defendant mentioned that if the Court were inclined to revisit the "completely relieved of duty" standard, "then it is in fact the Defendant who is entitled to a summary judgment on the noncompensability of Plaintiff's meal periods."

It is, of course, also well-established that a Court can grant summary judgment sua sponte. In preparation for trial, this Court raised the possibility of a defendant summary judgment during a telephone conference with counsel on November 20, 1992. The Court indicated its views at that time, and agreed to set up another telephone conference on November 25, 1992 after counsel for both sides were given a chance to examine the issue in light of the Court's views.

After a full consideration of all of the pleadings, other submissions, and statements from both parties through counsel during the two telephone conferences, for reasons set forth below, the Court grants summary judgment in favor of defendants on the issue of meal compensability. "A federal district court may grant summary judgment, pursuant to Fed.R.Civ.P. 56, sua sponte, provided that the party against whom judgment will be entered was given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted." *Interco Inc. v. National Sur. Corp.*, 900 F.2d 1264, 1269 (8th Cir.

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2. As this Court is holding that, as a matter of law, the meal times in this case are not compensable, the Court does not reach the question of whether such "work" would require compensation at the overtime rate of time and a half or whether defendant qualifies for the exemption afforded by 29 U.S.C. § 207(k).

1990) (citing 10A C.A. Wright, A.R. Miller & M.K. Kane, *Federal Practice and Procedure* § 2720, p. 27 (2d ed. 1983). "The granting of summary judgment sua sponte is consistent with the expeditions disposition of cases, a primary objective of Rule 56." *Id.*

STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law."

If the Rule 56 standard is met, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 586 (1986). "[T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Although the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the summary judgment motion, *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), this does not mean that the nonmoving party may simply rest upon general allegations in the complaint or assertions that there exists a genuine issue of fact. *See Lujan*, 110 S. Ct. at 3188.

FACTS

In this case the Court finds that there are no *material* facts at issue. For purposes of this motion, construing all disputed facts in favor of plaintiff, the Court accepts the following facts as true.

Appendix B

1. Plaintiffs were police officers, working for the City of North Little Rock Police Department, for all of the relevant times.

2. Plaintiffs worked 8.25 hour shifts, five days on, followed by two days off.

3. Plaintiffs had a .5 hour meal break during each shift.

4. Plaintiffs were paid for a 40 hour work week.

5. If plaintiffs' meal times were found to be compensable work time, plaintiffs in fact would be working 41.25 hour weeks.[3]

6. Plaintiffs must obtain clearance from dispatch prior to taking the meal period.

7. Plaintiffs were allowed to travel out of the patrol district for the meal period.

8. Every plaintiff had a locker assigned to him or her in the locker room where personal items, including civilian clothes, could be kept.

9. Plaintiffs were allowed to travel to headquarters to change into civilian clothes prior to taking the meal period, and such travel/changing time would be compensated.[4]

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3. Again, the Court notes that, in light of its decision that the meal time is not compensable, it does not address the issue of whether the extra 1.25 hours would qualify as "overtime" or whether it would be subject to the 29 U.S.C. § 207(k) exemption.

4. The Court notes that the relatively short period of time involved would often make this choice impractical, but certainly not impossible.

10. Break time did not begin until the officers arrived at their meal break destination.

11. Plaintiffs were required to monitor their radios during the meal period.[5]

12. Plaintiffs could, and often did, tend to personal errands during their meal breaks.

13. If plaintiffs remained in uniform, they were periodically approached by members of the public with questions or requests for assistance during meal periods and were expected to respond professionally.

14. If an emergency developed, plaintiffs on meal break could be called back to active duty.[6]

ANALYSIS

The Court acknowledges at the outset that this decision is contrary to two previous decisions of this Court regarding meal compensability: *May v. Arkansas Forestry Commission* and *Pebler*

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5. There is a factual dispute as to whether plaintiffs were required to monitor their radios or whether they simply did so as a matter of practice. No written policy concerning this issue existed at the time. The most recent written policy explicitly states that officers are not required to monitor their radios. However, plaintiffs maintain that during their training they were told orally that monitoring was required. Construing all facts in favor of plaintiffs, the Court simply accepts plaintiffs' claim for the purposes of summary judgment, without making any factual findings on this issue. The Court does note that it appears that no officer had ever been reprimanded or disciplined for failing to monitor the radio during a meal period.

6. The time subsequently spent on active duty would of course be compensable. It appears that this situation arose quite infrequently.

v. City of Sherwood. The issue has not yet been addressed by the Eighth Circuit. However, it has provided fodder for much discussion in other circuits. After reviewing the recent decisions in other Circuits, this Court is forced to conclude that its analysis in *May* and *Pebler* will probably not be accepted by the Eighth Circuit.

In *May*, this Court was faced with a number of issues regarding the appropriate compensation for firefighters. The principle issue concerned whether 24-hour "on-call" status when firefighters were off-duty qualified as compensable time. Under the circumstances of that case, this Court held that it was not. The issue of meal break compensability was also raised, on facts very similar to those in the present case and after looking at the relevant regulations, this Court determined that the meal breaks were compensable and granted summary judgment for plaintiffs. *May* was appealed on, among other things, the "on-call" issue and the Eighth Circuit reversed; the meal compensability issue was not raised on appeal, and thus the decision on that issue stood.

Shortly thereafter, *Pebler v. City of Sherwood* was filed. The facts in *Pebler* were virtually identical to the facts in the present case. Citing this Court's decision in *May*, plaintiffs moved for summary judgment on the issue of meal compensability, which this Court granted. The Court relied primarily on the language in the relevant regulations, which will be discussed at some length below, and *Nixon v. City of Junction City, Kansas*, 707 F.Supp. 473 (D. Kan. 1988).

Upon revisiting the issue in preparation for this trial, the Court reviewed the regulations and the more recent decisions from other circuits and has concluded that the regulations are inconsistent with federal case law interpretations of the relevant statute and

with the underlying principles of the Federal Labor Standards Act which the regulations are to construe. As such, the Court has concluded that it may not apply the plain language of the regulations, but must apply the standard for "work" which has been used since the FLSA took effect. "(R)egulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States et al. v. Larionoff*, 432 U.S. 873 (1977) [citing *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.")].

The present case is brought under the FLSA, 29 U.S.C. § 201 et seq. Specifically, this case focuses on § 207 of that Act which prohibits employers from employing persons for more than forty hours per week unless employees are paid at a rate not less than one and one-half times the employees' regular rate of pay "for hours worked" in excess of forty hours.

The regulations in question read as follows:

> 29 C.F.R. § 785.19(a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions.

Appendix B

> The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (cites omitted)
> (b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.
>
> 29 C.F.R. § 553.223(b) If a public agency elects to use the section 7(k) exemption, the public agency may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other tests in § 785.19 of this title are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., "stakeout"), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

Some courts have made much of the fact that § 553.223(b) does not contain the language "(t)he employee is not relieved if he is required to perform any duties, whether active or inactive, while eating," and have thus distinguished cases involving the § 207(k) exemption from those which do not involve the exemption. *See,*

e.g. Lamon v. City of Shawnee, Kansas, 972 F.2d 1145 (1992), *Brinkman v. Kansas Dept. of Corrections*, 1 WH Cases 2d 1, 6-8 (D. Kansas 1992). This Court agrees with the *Brinkman* court which found no rationale for distinguishing between those employees covered under § 207(k) and those who are not covered under the section. In light of the fact that § 553.223 specifically incorporates "all the other tests in § 785.19," 29 U.S.C. § 553.223(b), this Court can see no reason to apply a different standard of "completely relieved from duty" to those covered by the § 207(k) exemption. Thus, the § 207(k) exemption remains irrelevant to this Court's analysis of the issue of meal compensability.

The FLSA was passed by Congress in 1938 as a remedial measure requiring a minimum wage and limiting the maximum number of hours employees could be required to work before being paid an overtime wage. The backbone of the FLSA is the maximum hour requirements. Although the FLSA does not define which hours are worked, the United States Supreme Court has defined work as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of employer and his business." *Tennessee Coal Iron & R.R. Co. v. Muscode Local No. 123*, 321 U.S. 590, 598 (1944). Under that test, it soon became settled that time spent on standby or on-call, under certain circumstances, could be compensable time under the FLSA. *See Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) ("Of course an employer, if he chooses, may hire a man to do nothing . . . Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer.") *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944). When employees are on-call, the question of whether that employee is "working" has been

formulated as whether "the time is spent predominately for the employer's benefit or the employee." *Armour*, 323 U.S. at 133; *Birdwell v. City of Gadsen, Alabama*, 970 F.2d 802 (11th Cir. 1992); *Boehm v. Kansas City Power and Light Co.*, 868 F.2d 1182 (10th Cir. 1989); *Halferty v. Pulse Drug Col. Inc.*, 864 F.2d 1185, 1187 (5th Cir. 1989). This question is "dependent upon all the circumstances of the case." *Skidmore*, 323 U.S. at 136.

Thus, since 1944, in most contexts where the definition of "work" under the FLSA has arisen, courts have applied some version of a "predominantly for the benefit of the employer or employee" test to determine whether the time in question constituted work. "Federal courts bear the ultimate responsibility for interpreting federal statutes," *Meade TP. v. Andrus*, 695 F.2d 1006 (6th Cir. 1982). Congress has assuredly been aware of the definition the federal courts were applying to the term "work" and Congress has not offered a contrary definition. Therefore, the definition and interpretation of the term "work" in the FLSA, as established by the federal courts, *is* the definition of the term "work" for purposes of interpreting the FLSA.

The Wage and Hour Division of the Department of Labor promulgated regulations to interpret the FLSA. Such regulations are required to be judicially noticed and are presumptively valid, However, "regulations promulgated pursuant to rulemaking authority conferred by statute assume the force of law only to the extent consistent with the statutory scheme they were designed to implement." *Pearce v. Director, Office of Worker's Compensation Programs*, 647 F.2d 716, 726 (7th Cir. 1981). Although "judicial deference to *reasonable* interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law, "*Nat. R.R. Passenger Corp. v. Boston & Me. Corp.*, 112 S. Ct. 1394, 1401 (1992) (emphasis added), a court must look to the

structure and language of the statute as a whole in determining whether the agency's interpretation is to be controlling. *Id.* A court "need not accept an interpretation which is unreasonable." *Id.* at 1402. The regulations in question define "work" for the purposes of meal periods as time during which employees are "required to perform any duties, whether active or inactive" and as time during which employees are not "*completely* relieved from duty," 29 U.S.C. §§ 785.19, 553.223(b). The Wage and Hour Division promulgated § 785.19 in 1961 and § 553.223(b) in 1987. The definition of work applied by the federal courts under the FLSA since 1944 is a much less stringent "predominately for the benefit of the employer" standard. This Court finds the regulations inconsistent with the statutory scheme they were designed to implement, and thus invalid.

One court faced with the inconsistency phrased the problem as "whether for deciding if a meal period is compensable under FLSA should be exclusively the literal application of a relevant regulation or should include the fundamental principles of FLSA embodied in the definition of 'work' developed by case law." *Brinkman,* 1 WH Cases 2d at 6. After thoroughly analyzing a number of cases in other courts, the *Brinkman* court concluded that all of those "cases put the focus on whether the time spent during he lunch period predominately benefits the employee or the employer."

This Court has also reviewed the recent cases dealing with this issue and has come to the same conclusion. In *Brinkman* itself, the Court found that even where corrections officers were required to eat in a "break room", required to remain in uniform, prohibited from leaving the grounds of the facility or going to their automobiles, prohibited from bringing "contraband" reading material into the break room, remain subject to call, and denied access to outside visitors such as family members, it remained a

jury question under the "predominately for the benefit of the employer" standard as to whether the meal time was compensable. *Id.* at 9.

In *Lamon v. City of Shawnee, Kansas,* 972 F.2d 1145, (10th Cir. 1992), the Court dealt with the compensability of police officers' meal periods. The officers were required to notify the dispatcher when the meal period began; were subject to call; had to leave a telephone number where they could be reached or to monitor a portable radio; had to respond if instructed to do so; had to respond to citizen requests or reports of crimes; and were prohibited from conducting personal business errands, such as picking up laundry, getting a haircut, or grocery shopping. *Id.* The 10th Circuit found the trial court's instruction regarding the compensability of meal periods to be in error for citing the "not relieved if he is required to perform any duties, whether active or inactive, while eating" language of § 785.19.

The *Lamon* Court stated that just because a police officer "is *on-call* and has some limited responsibilities during meal periods does not perforce mean the officer is working." *Id.* at 1157 (emphasis added). The Court went on to say that "consistent with the language of § 553.223(b) and with traditional principles underlying FLSA, a law enforcement employee is completely relieved from duty during a meal period, for purposes of § 553.223(b), when the employee's time is not spent *predominantly for the benefit of the employer." Id.* (emphasis added). The *Lamon* Court, as noted earlier, made much of a distinction between § 553.223(b) and § 785.19, a distinction for which this Court sees no basis. The *Lamon* Court gave lip service to the phrase "completely relieved from duty," while applying the "predominantly for the benefit of he employer" test. In even stronger language, the *Lamon* Court stated that "if during meal

periods a police officer's time and attention are primarily occupied by a private pursuit, presumably the procurement and consumption of food,[7] then the officer is completely relieved from duty and is not entitled to compensation under FLSA."[8] *Id.* In that case, the Court found that even under the "predominately for the benefit of the employer" test, meal compensability was a question for the jury, in part because the officers were prohibited from running personal errands.

Similarly, in *Leahy v. City of Chicago,* 785 F. Supp. 724, 727 (N.D. Ill. 1992), the Court found that police officer's meal periods were not compensable even though officers were required, among other things, to remain within assigned district; to carry weapon and remain in uniform, to report meal locations; to terminate meal period if assistance needed, to refrain from playing golf, reading nondepartment material, resting or napping, or consuming alcoholic beverages, to respond to citizen requests, and to remain in radio contact. Obviously, the Court there was not applying the plain meaning of the phrase "completely relieved from duty."

In the present case, the critical *requirements* are: 1) that the officers notify the dispatcher as to when and where the officer is taking his lunch; and 2) that the officers monitor the radio. Although the officers may remain in uniform or stay within the patrol district, they are not required to do so. Nor is any limitation put on what sort of personal errands the officers may run. In short,

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7 Some people might prefer to refer to this activity as "eating.".

8 How such an officer can be said to be "completely relieved from duty" in this situation or in any of the other cases discussed herein, is beyond this Court's comprehension. If that language is not stricken down as contrary to the statute, then *May* and *Pebler* are correct and summary judgment should be granted for the plaintiffs.

the present case seems to be a typical "on-call" case, the standard for which has long been the "predominantly for the benefit" test.

The Eleventh Circuit recently reviewed several "on-call" cases from various circuits in *Birdwell v. City of Gadsen, Ala.*, 970 F.2d 802 (11th Cir. 1992). In *Birdwell* itself, the Court was faced with detectives who were on-call around the clock. The detectives could not leave home unless they left a forwarding number or owned a beeper. Those detectives who did not own a beeper could not participate in outdoor activities such as fishing or hunting, go out of town, go on vacation, go on outings with their families, or drink any alcohol. Finding that "it is clear that an employee's free time must be severely restricted for off-time to be construed as work time for purposes of the FLSA," the Court found that the time was not so restricted that it was not used predominately for the employee's benefit. The Court instructed the district court to enter a judgment in the defendant's favor on that issue as a matter of law.

The Fifth Circuit reached a similar result in *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991) (en banc). In *Bright*, the plaintiff could not become intoxicated, was required to be able to be reached by beeper at all times, was required to *arrive* at the hospital within approximately 20 minutes of being called, had no days off and no vacation. *Id.* at 673. The Fifth Circuit found that this on-call time was not compensable under the FLSA.

The Tenth Circuit considered the issue in *Boehm v. Kansas City Power and Light Co.*, 868 F.2d 1182 (10th Cir. 1989). Linemen for a power company were on-call around the clock during storms and emergencies. The employees were required to be reachable and were required to accept at least one in three calls. The Court found that "defendant's call-out policy . . . was not so

restrictive that a jury reasonably could conclude that the time was spent predominately for the employer's benefit." *Id.* at 1185.

As this court views the matter, "work" for the purposes of the FLSA should be defined in a consistent manner for all purposes of the Act. This Court sees no logical or reasonable basis for affording the term one definition for on-call duty in most contexts, and a different definition if the on-call duty occurs during the lunch break. Indeed, it seems that the most common requirements of being on-call would be more onerous in a 24-hour context than during the meal period. If one is required to be reachable and to report within a short amount of time *at all times*, one's activities are limited. There are activities that become either prohibited or prohibitively inconvenient. Travel, vacation, outdoor activities, paid entertainment which is subject to interruption at any time, entertaining guests . . . all of these things are restricted. On the other hand, a police officer who is allowed to change into personal clothes and run personal errands is free to do virtually anything that can be done in a 30 minute period. Indeed, this Court can think of no activity which could be completed in a 30 minute time frame which is restricted due to the officer's on-call status.

Reviewing other cases dealing with the issue, this Court concludes that other courts agree that the term "work" ought to be afforded a consistent definition. Other courts have achieved consistency by reading "completely relieved from duty" as "predominantly for the benefit of the employee." This Court agrees that the appropriate test is the "predominately for the benefit" test, but fails to see how the plain meaning of "*completely* relieved from duty" can be reconciled with the "*predominately* for the benefit" standard. In this Court's view, the regulations at issue are inconsistent with the fundamental principles of FLSA embodied in the definition of "work" developed by case law. The Court will thus

apply the "predominately for the benefit" test to the case at hand.

Under the "predominately for the benefit of the employer" standard for compensability of on-call time, this Court finds that a reasonable jury could not return a verdict in favor of the plaintiffs on this issue. Even accepting that plaintiffs were required to monitor their radios during the meal breaks, the Court finds that the plaintiffs could and did use their time primarily for personal pursuits. There were no practical restrictions on the activities which plaintiffs were allowed to engage in during the 30 minute meal break. This distinguishes the present case from *Cross v. Arkansas Forestry Com'n*, 938 F.2d 912 (8th Cir. 1991). In *Cross*, which is the appeal of the *May* case discussed earlier, the Eighth Circuit noted that the plaintiffs, by being required to monitor radio transmissions around the clock, were restricted from entertaining in their homes, attending social gatherings, attending church services, or engaging in other personal pursuits. *Id.* at 917. The Court also noted that the policy placed the employees on subject-to-call status twenty-four hours per day every day of a work period, unless a supervisor agreed to substitute for a particular employee for a period of time. *Id.* Under those circumstances, the Court found that a reasonable jury could find that the employees were "engaged to wait" while on subject-to-call status, rather than "waiting to be engaged." In the present case, where the on-call status is limited to a 30 minute lunch break, this Court does not see how the plaintiffs are restricted from activities in which they might reasonably expect to participate were they not on-call.

Hence, for reasons discussed above, the Court grants summary judgment for defendants on the issue of meal compensability. As this issue is determinative of the present action, judgment should be, and hereby is, entered in favor of defendant.

Appendix B

IT IS SO ORDERED this 7th day of December, 1992.

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UNITED STATES DISTRICT JUDGE